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January 26, 2012

VIA FACSIMILE ONLY (664-4201)

Bernard A. Pishko, City Attorney
Adam D. Melita, Deputy City Attorney
City of Norfolk
810 Union Street
900 City Hall Building
Norfolk, VA 23510

Re: Norfolk Community Services Board v. Linda Berardi, et al.
Case No.: CL11-2968

Gentlemen:

In a letter dated September 19, 2011, a copy of which is attached hereto (along with the materials included with that correspondence), I urged you to reconsider the propriety of refiling a lawsuit on behalf of the Norfolk Community Services Board. This letter was designed to head off wasteful, baseless litigation, and I provided you with Norfolk police investigatory materials that appeared to be unfamiliar to you. Despite that letter, you pressed ahead, and eventually we will find out whether the Norfolk Circuit Court allows the CSB to proceed on the refiled suit.

In the meantime, I am aware of the City Council "briefing" that occurred on Tuesday, January 24. Did you provide my September 19, 2011 letter and enclosures to the City Council members? Did you show them the defensive pleadings that point out the lawsuit's shortcomings? If not, why not?

I have taken the time to watch the video from the January 24 presentation, and my clients and I are deeply disturbed by numerous inaccuracies and omissions that appeared to lead at least one member of City Council to make remarks that are either defamatory or awfully close to it. This letter will summarize some of the problems.

First, Mr. Pishko misstated what happened with the Berardi and Crisp VEC unemployment compensation appeals. Mr. Crisp prevailed at the first appeal level, and a copy of the decision is attached. The City did not seek any further review of that ruling. Ms. Berardi had to appeal to the next level up, but she also prevailed, and the

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City did not seek any further review. A copy of that ruling is attached. Did you share these VEC decisions with the members of City Council? If not, why not? As you know, the decisions were rendered after sworn testimony was received from Berardi, Crisp and Womack in two separate hearings, and after lengthy argument presented by counsel for the claimants and the City. These two quotes from the Berardi and Crisp VEC decisions demonstrate that after the presentation of sworn testimony and argument of counsel, independent VEC decision-makers flatly rejected assertions that either claimant engaged in any type of fraud, deceit or dishonesty:

Crisp VEC Decision, February 18, 2011:

Here, the employer has not shown that the claimant failed to insure than an employee who had been on administrative leave for a long period of time was brought [to] the attention of a person who could resolve the situation, or had a duty to take any further action. The employer also did not show that the claimant's acts were based in fraud.

* * * *

The claimant testified that he attempted to bring this matter to the attention of several people in the HR department and payroll, as well as the director of administration. The claimant also testified that he approached the topic at several management level meetings and at board of directors meetings. The claimant testified that he believed that the issue was being acted upon, and that there was a purpose that he was unaware of for the employee to remain on payroll. The claimant had no personal authority to make payroll decisions. The employer did not provide evidence to the contrary.

* * * *

Here, as stated above, the claimant made reasonable attempts to speak to the appropriate parties about the status of the employee. Because the appropriate parties failed to act on the claimant's warnings, they therefore condoned the claimants continuing to submit the employees timecard.

Berardi VEC Decision, June 9, 2011:

The employer has not demonstrated in the record of proceedings, however, that the claimant, somehow, breached her duty of care or responsibility to the employer to protect its assets and resources or any other duty she owed the employer, or that she violated any whistleblower or other law, as the executive director has maintained during these claims adjudication proceedings.

Further, there is absolutely no evidence in the record that the claimant engaged in any type of fraud, dishonesty, misrepresentation or deceit relative to the overall J.M. matter, or that she had any type of financial gain from it whatsoever.

I am confident that the members of City Council would like to know that two different VEC appeals examiners considered all of the evidence and argument that the City of Norfolk was capable of offering, and they both rejected the same basic theories that your office is now promoting in the pending civil suit.

Along similar lines, have you shared with the members of City Council copies of the sworn interviews conducted by your office when it first began investigating the McGlone situation? Does the Council understand that Berardi and Crisp cooperated fully in the interviews and provided emails and other evidence to assist with the process? At least one Council member appeared to be under the impression that former CSB employees may have "pled the Fifth" or otherwise refused to cooperate. Of course, you know and should have made clear that Berardi and Crisp cooperated fully and gave testimony in both the investigation and in VEC proceedings.

In watching the informal session video, I also saw that Mr. Melita told the Council that the explanation provided as to how Ms. McGlone remained on payroll is that "they forgot to deal with this" or when "they were reminded to deal with it, other things came up and it didn't get handled." In my view, "they" is confusing and potentially quite misleading. My clients - - Berardi and Crisp - - most certainly did not ever say that "they" forgot to do something or that other things came up. In my view, the presentation should have been much more precise as to who did and said exactly what.

Additionally, does Council know the procedures and processes that have to be followed when employees are suspended and/or terminated? My clients did not write the City's employment procedures; they simply followed the rules. From watching the video, I got the impression that the Council may not have understood that my clients acted in accordance with Norfolk City policy and communicated truthfully at all times.

Finally, I am troubled by the ongoing discussion concerning possible criminal indictments and a suggestion that the City should lobby the Commonwealth's Attorney to reverse the prior decision not to prosecute. In fact, a member of Council suggested that if Mr. Underwood won't prosecute, perhaps the City should try to go around him and make a presentation to a grand jury without his office's involvement or approval. To the extent that Berardi and Crisp are the targets of any such lobbying effort, and to the extent that they find themselves defending against baseless charges and/or falsely accused of criminal misconduct, they will seek all appropriate and available civil remedies. It is clear to me that either the City Council has not been provided with full information, or that members of Council have not taken the time to read the information before making damaging remarks and suggesting an unwise course of action. No fully

informed prosecutor or other attorney could reasonably believe that these facts warrant a criminal prosecution.

Accordingly, I call upon you to share with the members of Council the full police investigatory files and to make a fair and balanced presentation at which the legal positions of all parties are made known. To base a presentation on the CSB's Amended Complaint - - and little or nothing else - - is unfair to the Council, the individuals involved in this controversy, and the public at large. If invited to participate in a discussion with Council and/or with the Norfolk Commonwealth's Attorney, I will gladly accept, and I suspect that the attorneys for the other parties will do so as well.

My clients have nothing to hide, and they want the truth to come out. I certainly hope and expect that you feel exactly the same way.

Sincerely yours,


Kevin E. Martingayle

KM/kls

Enclosures

cc: Norfolk City Council (Via Electronic Mail)
Thomas B. Kelly, Esquire (Via Electronic Mail)
Andrew M. Sacks, Esquire (Via Electronic Mail)
John W. Bonney, Esquire (Via Electronic Mail)
Gregory D. Underwood, Norfolk Commonwealth's Attorney (Via Electronic Mail)
Linda M. Berardi (Via Electronic Mail)
Anthony D. Crisp (Via Electronic Mail)

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September 19, 2011

VIA FACSIMILE (664-4201)
and FIRST CLASS MAIL

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Norfolk City Attorney's Office
900 City Hall Building
810 Union Street
Norfolk, VA 23510

Re: Norfolk Community Services Board v. Linda Berardi, et al.
Case No.: CL11-2968

Dear Adam:

As a follow up to the demurrer hearing held in Norfolk Circuit Court on September 14, you, Tom Kelly and I had an opportunity to speak after court, and I told you in that conversation that I believe that documents supplied by your office on August 29 and August 30, 2011 demonstrate conclusively that no form of "fraud" was committed by my clients. When we were talking about this, I got the impression that you had not yet reviewed the documents sent to me by Assistant City Attorney Tamele Yvette Hobson, so I encouraged you to read through all of the information before proceeding any further on behalf of the Norfolk CSB against Ms. Berardi and Mr. Crisp. I believe that a review of this material, along with all of the other material compiled by your office during its investigation, is required in order to meet your obligations under Code §8.01-271.1.

For your ease of reference, I am attaching hereto the following sample of materials sent to me by Ms. Hobson:

1. A "Narrative" resulting from the City's investigation;
2. "Investigator's Notes";
3. A January 19, 1999 memo from Senior Deputy City Attorney Daniel R. Hagemeister to NCSB Director of Administration Brenda B. Wise.

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Page 2

The import of these documents should be fairly apparent. First, they demonstrate that neither Ms. Berardi nor Mr. Crisp made any misrepresentations of any sort. To the contrary, the investigation reveals that Ms. Berardi and Mr. Crisp asked questions and kept appropriate individuals advised.

Second, the January 19, 1999 memo from Mr. Hagemeister to Ms. Wise proves that your office was aware of Ms. McGlone's employment status, and although I have in my possession copies of numerous subsequent communications from your office to Ms. Wise and Mr. Pratt, it does not appear that there was any meaningful follow-up to make sure that an appropriate final resolution occurred. If Ms. Berardi and Mr. Crisp are theorized to have any liability for failing to take further affirmative action to see that Ms. McGlone's employment status reached a final determination, that exact same logic applies with equal or greater force to the Norfolk City Attorney's Office. Therefore, I would caution you against stretching too far to try to find a liability hook to employ against Ms. Berardi and Mr. Crisp. There is simply no good-faith basis for the City or CSB to sue Ms. Berardi and/or Mr. Crisp for recovery of wages paid to Ms. McGlone.

Finally, I have serious doubts regarding the propriety of your office remaining as counsel in this matter. It is obvious that some current and former attorneys and staff members will be material witnesses if this litigation continues to go forward.

I look forward to hearing from you, and to the extent that you disagree with the analysis set forth in this letter, I hope that you will contact me to discuss this before proceeding further against my clients.

Thanking you in advance for your anticipated diligence and cooperation, and with kind regards, I am,

Very truly yours,


Kevin E. Martingayle

KM/kls
Enclosure

cc: Bernard A. Pishko, City Attorney (Via Facsimile Only 664-4201)
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Jill McGlone (Via First Class Mail)
Linda Berardi (Via Electronic Mail)
Anthony Crisp (Via Electronic Mail)